

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: M.J.

Date of Birth: [redacted]

Dates of Hearing:
December 1, 2010; February 10, 2011

CLOSED HEARING

ODR No. 01634-1011AS

Parties to the Hearing:

Representative:

Parent[s]

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Date Record Closed:

February 28, 2011

Date of Decision:

March 15, 2011

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

Student¹ is an elementary school-aged student who resides in the above-named School District (hereafter District) and is eligible for special education by reason of a specific learning disability. Student's parents filed a due process complaint on October 6, 2010 under both the Individuals with Disabilities Education Act (IDEA)² and Section 504 of the Rehabilitation Act of 1973 (Section 504),³ challenging the educational program offered and provided to Student by the District for the 2008-09, 2009-10, and 2010-11 school years. As remedies, the Parents sought compensatory education for a portion of the 2008-09 school year (from October 6, 2008 forward), the entire 2009-10 school year, and the very beginning of the 2010-11 school year; they also sought tuition reimbursement for the 2010-11 school year.

The hearing convened over two sessions at which the parties presented evidence in support of their respective positions. For the reasons which follow, I find in favor of the Parents in part and in favor of the District in part.

ISSUES

1. Whether the District failed to provide Student with appropriate special education programming during the 2008-09 and 2009-10 school years, as well as the very beginning of the 2010-11 school year; and, if so, is Student entitled to compensatory education;
2. Whether the District failed to offer Student an appropriate special education program for the 2010-11 school year; and, if so, are the Parents entitled to tuition reimbursement?

FINDINGS OF FACT

1. Student is an elementary school-aged student who resides with Student's parents in the District. Student is eligible for special education by reason of a specific learning disability. (Notes of Testimony (N.T.) 15)

Background

2. Student was first evaluated for special education by the District in 2006 due to problems with reading and attention. At that time Student was attending a private kindergarten. Student was not determined to be eligible for special education, although Student did receive speech and language therapy once each week in the private kindergarten. (Parent Exhibit (P) 9)

¹ Student's name and gender are not used in this decision to protect Student's privacy.

² 20 U.S.C. §§ 1401 *et seq.*

³ 29 U.S.C. § 754.

3. During first grade, the 2006-07 school year, the District again evaluated Student because Student was not making progress in reading even with “intensive supports” (P 9 at 1) in the regular education classroom. The Evaluation Report (ER) noted that in the fall of 2006, Student had scored at the “intensive-needs substantial intervention” level on an administration of the Dynamic Indicators of Basic Early Literacy Skills (DIBELS) at the first grade reading level.⁴ (P 9 at 3) Student also displayed immature social behaviors and difficulty staying on task and sitting still. Standardized cognitive testing revealed mostly average range scores with a relative weakness in long-term retrieval. The District determined that Student was eligible for special education based upon a specific learning disability in reading, but determined there were no significant behavioral or emotional difficulties. (N.T. 27, 29, 242-43, 279-80, 283-84; P 9)
4. During the summer of 2008, Student’s parents requested a meeting with the principal of Student’s elementary school because they were concerned with Student’s educational progress. The Parents asked the principal about retaining Student to repeat second grade but the principal did not believe that was a sound educational option for Student. (N.T. 359-60)

2008-09 School Year

5. Student entered third grade at the beginning of the 2008-09 school year, and the District implemented the Individualized Education Program (IEP) developed in March 2008. In the Present Levels of Academic Achievement and Functional Performance section, this IEP noted that Student was instructional at the 1.0 (primer) reading level and was “not always fully engaged during language arts lessons.” (School District Exhibit (S) 4 at 4) Student’s identified needs were in the areas of reading fluency, written expression, written language and spelling, phonological skills, and self-monitoring skills. Student was in the learning support classroom for all language arts instruction which included phonics, reading fluency, and writing, all provided in a small group setting. Student was in the regular education classroom for math, science, and social studies instruction and was provided support in that environment through reading support and paraprofessional support. According to the IEP, the amount of time Student spent each week outside of the regular education classroom was 7.5 hours. (N.T. 27-28, 64-66, 78-81, 98-99; S 4)
6. Student’s March 2008 IEP contained goals addressing oral reading fluency (from a baseline of 27 words per minute at a 2.0 level, to goal of an average of >90 words per minute with >90% accuracy at a 1.0, 1.5, and 2.0 level); decoding and encoding in a sequential/phonological reading program (from a baseline of 69% accuracy decoding first grade phonics words⁵ untimed and encoding with >75% accuracy, to a goal of decoding to automaticity and encoding >80% of first grade phonics words and >75% of second grade phonics words); reading comprehension (using pre-reading, reading, and post-

⁴ Student again scored at the intensive level in a subsequent DIBELS administration at the first grade level in January 2007. (N.T. 27; P 9 at 13)

⁵ The IEP goal for decoding/encoding was based upon Project Read, which uses the term “word study words;” the term refers to consonant-vowel-consonant words, also referred to as phonics words. (N.T. 72-74) For ease of discussion, this opinion will refer to “phonics words.”

reading strategies to answer comprehension questions); and written expression (writing a paragraph with a topic sentence, four or more supporting details, and a conclusion or transition sentence, with appropriate conventions). Program modifications and specially designed instruction provided for, among other things, direct reading instruction at Student's instructional level, and a sequential, systematic reading program. (S 4)

7. At the beginning of the 2008-09 school year, based upon progress monitoring reports as of June 2008, Student was showing growth toward the goals in the March 2008 IEP as follows. In oral reading fluency, Student read 25 words per minute on first grade DIBELS probes with one error, and in nonsense word fluency, Student read 50 sounds per minute; in decoding/encoding, Student spelled 100% of first grade sight words and 100% of first grade phonics words, and spelled 11% of second grade sight words and 17% of second grade sight words; Student read 87% of first grade sight words and 100% of first grade phonics words, and read 6% of second grade sight words and 53% of second grade phonics words, all with time to sound out the words; and in written expression, Student was writing an organized paragraph with three or more supporting details and with proper capitalization and ending punctuation. (S 12)
8. For the sequential/phonological reading program during the 2008-09 school year, the District used Project Read, and for Student's fluency needs, the District used Read Naturally, among others. However, Student's progress monitoring was reported only through DIBELS. (N.T. 93-95; S 22)
9. The District re-evaluated Student in the fall of 2008 and issued a Re-Evaluation Report (RR) in December 2008. (N.T. 244, 359; S 5) Student's learning support teacher reported that Student was struggling with reading and had "shown minimal progress toward reaching reading goals." (S 5 at 1)
10. There was no formal quarterly progress monitoring reported for the fall of 2008, as the District was focusing on Student's RR. The RR reflected Student's educational levels in reading fluency, phonics (encoding/decoding), writing fluency, and reading comprehension. (N.T. 84-85; S 5)
11. The RR reported cognitive assessment (the Differential Ability Scales-Second Edition (DAS-II), several subtests from the Woodcock-Johnson Tests of Cognitive Ability-Third Edition (WJ-III COG), and two subtests from the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV)), reflecting average scores in all clusters and in General Cognitive Ability. Student did, however, demonstrate relative weaknesses in short-term memory, working memory, visual-auditory learning and retrieval, and phonological processing. (N.T. 285-88; S 5)
12. A number of subtests of the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III ACH) were also administered, revealing below-average achievement in the areas of reading (letter-word identification, reading fluency, and passage comprehension) and written language including spelling. Student's poor phonetic decoding skills were noted throughout this section of the RR. (S 5)

13. In social and behavioral assessment, Student's teachers completed the Teacher's Report Forms of the Achenbach System of Empirically Based Assessment (ASEBA). Results indicated all normal-range scores on the Problem scales and the DSM-oriented scales, with the exception of one teacher's responses on the Anxiety Problems scale which were in the borderline clinical range. (S 5)
14. Student's IEP was revised in December 2008 after the RR was completed. This IEP summarized information from the RR and identified needs in reading fluency, phonics, writing fluency, and memory skills. (N.T. 41, 259; S 6, S 8)
15. The December 2008 IEP included goals addressing reading fluency (from a baseline of 29 words per minute on a 1.5 level, to a goal of >90 words per minute on a 1.5 level with > 90% accuracy); decoding and encoding to automaticity at the first and second grade levels (from a baseline of reading 32% of first grade words and spelling 82% of first grade phonics words, to a goal of reading and spelling first grade phonics words with 100% accuracy and second grade phonics words with >25% accuracy); and written expression (with a goal of writing a one- to two-paragraph essay containing certain elements). (S 8)
16. Decoding words to automaticity is a more difficult skill than allowing a student unlimited time to sound out the word. (N.T. 45)
17. Student's IEP team removed the reading comprehension goal in the December 2008 IEP because Student was demonstrating an ability to comprehend grade-level materials which were read to Student. Two items of specially designed instruction were added to the December 2008 IEP: all tests would be taken in the resource room and strategies would be provided to help Student with storing information; one item of specially designed instruction (question probes for understanding) which had been in the December 2008 IEP was removed. The Parents approved the Notice of Recommended Educational Placement (NOREP). (N.T. 50-52, 54, 258-60; S 4, S 7, S 8)
18. In March 2009, Student's IEP was revised to add Student's eligibility for extended school year (ESY) services. The Parents approved the NOREP. (N.T. 42, 54-55; S 9, S 10, S 11)
19. Progress monitoring during the 2008-09 school year reflected variable but improving scores for nonsense word fluency on probes at the first grade level (from 35 sounds correct per minute in September 2008, to 60 sounds and 19 words correct per minute in February 2009, when the District stopped probing Student's nonsense word fluency⁶); and variable scores for oral reading fluency at an end of first grade level (from 17 words per minute with 5 errors in September 2008, to a high of 47 words per minute with 3 errors in January 2009). After January 2009, Student's oral reading fluency varied between 30 words per minute with 3 errors and 41 words per minute with 3 errors. (N.T. 37-38, 42-43, 67-73, 75-78; S 1, S 2, S 22)

⁶ Once a Student attains a specific level of nonsense word fluency, the Student is considered to be established and is no longer monitored for that particular skill. (N.T. 159-60)

20. At the end of the 2008-09 school year, progress monitoring on Student's oral reading fluency reflected that Student was below benchmark (grade level) and that Student's progress toward the benchmark was not in line with the goal of reaching grade level fluency within the duration of the then-current IEP. By June 2009, Student was reading an average of 39 words per minute on 1.5 level materials with 95% accuracy. (N.T. 32-33, 85-88; S 14, S 22)
21. Student's progress on the decoding/encoding goal for the 2008-09 school year reflects that Student was able to accurately read and spell 82% of first grade phonics words and 23% of second grade phonics words in February 2009. Progress for the remainder of the school year is expressed in percentages of accuracy on spelling and dictation measures. (S 22)
22. In the area of written expression, where Student had been writing a one-paragraph essay with three or more supporting details at the end of the 2007-08 school year, Student was in June 2009 writing a one-paragraph essay on a single topic, scoring a 13 out of 20 on the District's writing assessment rubric, an increase from 7 out of 20 as reported in the RR in the fall of 2008. The rubric includes the elements of Focus, Content, Organization, Content, and Conventions. The District uses a team approach to grading writing pieces using its rubric. (N.T. 89-91, 95-96; S 12, S 22)
23. Student's achieved final A grades in all subjects during the 2008-09 school year with the exception of writing, for which Student received a C grade. (S 15)
24. On the Pennsylvania System of School Assessment (PSSA), Student scored in the advanced level in Mathematics and in the below basic level in Reading. (S 13)
25. Student attended an ESY program over the summer of 2009 working on reading fluency, reading comprehension, sequencing, writing, and mathematics. With respect to oral reading fluency, Student averaged 34.5 words per minute with 90% accuracy at a first grade level during the ESY program. (N.T. 104, 363-64; S 17)

2009-10 School Year

26. In the fall of 2009 (fourth grade), Student began working with second grade reading level materials. Beginning in September 2009, Student was also provided with decoding and spelling instruction using the Wilson Reading Program, as well as writing instruction, in a small group setting. The special education teacher who worked with Student in the Wilson Reading Program started Student in Book 1 at level 1.3. She worked with Student on fluency and vocabulary in addition to the Wilson Reading Program. (N.T. 102-04, 112, 125-30, 144-45, 302-03, 305-11, 314, 322, 324-26; S 21, S 22)
27. Student's decoding/encoding goal in the December 2009 IEP was based on the Project Read program. The Project Read program differs from the Wilson Reading Program and Student's progress on the decoding/encoding goal in the fall of 2009 was reported based on an average of Student's performance in the Wilson Reading Program, Book 1. At the

end of the first quarter of the 2009-10 school year, Student achieved an average of 85% on Book 1 of the Wilson Reading Program. (N.T. 304-05, 307; S 22)

28. During the 2009-10 school year, Student was supported in the regular education environment by a special education teacher or a paraprofessional. (N.T. 327-28)
29. In the first quarter of the 2009-10 school year, based on DIBELS probes, Student was reading an average of 35 words per minute on a second grade level. (N.T. 136-38; S 22)
30. A new IEP was developed for Student in December 2009. This IEP contained annual goals addressing reading comprehension (using pre-reading, reading, and post-reading strategies to answer comprehension questions on first, second, and third grade reading levels); reading fluency (from a baseline of 44-90 words per minute at the second grade level, to a goal of reading >70 correct words per minute on 2.0 and 2.5 grade level materials with 90% accuracy); written expression (writing narrative, persuasive, and research papers of one or two paragraphs with appropriate elements and conventions); and decoding and encoding using a systematic, sequential reading program. Program modifications and specially designed instruction related to, among other things, individual and small group instruction for reading and writing, new information presented in multiple formats, and content area books on tape. The Parents approved the NOREP. (S 19, S 20, S 21)
31. Pursuant to the December 2009 IEP, Student had individual reading/phonics instruction three times per week, reinforcement of that reading instruction for thirty minutes each day, and also had small group instruction in reading comprehension, listening comprehension, fluency, vocabulary, and writing. Student's special education teacher believed that Student was ready to begin Wilson Book 2 at this time, but Student needed individualized instruction to repeat the portion of the Wilson program previously provided in a small group setting. Student spent approximately two hours per day in the learning support classroom for the remainder of the 2009-10 school year. (N.T. 118-22, 144-45, 153-54, 310-14, 324-26, 330, 366-67)
32. Student's oral reading fluency over the course of the 2009-10 school year based on DIBELS probes at the second grade level reflected scores of 25 correct words per minute in September 2009 to highly variable scores in May 2010 (ranging from 39 words correct per minute to 93 words correct per minute). (N.T. 130-35, 149-50; S 29)
33. Progress monitoring in the spring of the 2009-10 school year reflected that Student was using the systematic, sequential reading program and continued to work on reading comprehension; by June 2010, Student scored 89% on Book 1 in the Wilson Reading Program which assesses reading, spelling, and writing. Student was working on more difficult skills in the Wilson Book 1 by the end of the school year than in December 2009. In oral reading fluency, Student was reading an average of 42 words per minute on second grade passages using the DIBELS by the middle of February 2010, an average of 49 words per minute on second grade passages at the end of April 2010, and back down to an average of 42 words per minute on second grade passages in June 2010. (N.T. 116, 138-40, 308-09, 342-43; S 22, S 30)

34. In the area of reading comprehension, with a goal for that need returned to the December 2009 IEP, Student consistently achieved scores in the 90-100% range on a variety of measures at a 2.0 and 2.5 level in February, April, and June 2010. There was no baseline in this goal, however. (S 21, S 30)
35. In the area of written expression, Student's score on the District's writing rubric improved from 8 out of 20 in September 2009 (below basic), to 11 out of 20 by the middle of February 2010 (basic), and to 14 out of 20 (proficient) by the end of the 2009-10 school year. Student was also attaining higher percentages on other written expression assessments used by the District to report progress in this area such as the Framing Your Thoughts program, in which Student attained 90% in April 2010 and 100% in June 2010, an increase from a 77% score in that program in the fall of 2009. (N.T. 140-44; S 21, S 22, S 30)
36. In late April 2010, the Parents contacted the District to request a re-evaluation. The Parents also advised that they would be obtaining a private evaluation over the summer, and the District's school psychologist explained her concern with conducting duplicative assessments. The parties agreed to delay a District re-evaluation and determined that the IEP team would consider the independent evaluation at the beginning of the 2010-11 school year. (N.T. 261-63, 367-68; S 40, S 41)
37. Also in late April 2010, as a follow up to the decision to delay any District re-evaluation, the District's elementary special education supervisor suggested that Student be provided with additional supports, perhaps with the reading specialist, and that a team meeting be scheduled to accomplish that. No such meeting occurred. (N.T. 315-16; S 41)
38. Student's final grades for the 2009-10 school year were in the A and B range and, with few exceptions, were in that range throughout each marking period in all subjects. (N.T. 130; S 30)
39. Student's PSSA scores in the spring of 2010 were below basic in reading, proficient in mathematics, and advanced in science. (S 27)
40. Student was independently evaluated over the summer of 2010 by a neuropsychologist who conducted a number of assessments and obtained input from Student's teachers. She also had Student, the Parents, and two of Student's teachers complete the Behavior Assessment System for Children-Second Edition (BASC-2), and Student's teachers and parents completed the Behavior Rating Inventory of Executive Function (BRIEF). The BASC-2 and BRIEF yield few significant concerns; however, the neuropsychologist concluded that Student had experienced a decline in self-esteem and was at risk for anxiety and depression. (N.T. 207-11; P 10; S 31)
41. Student's full scale IQ score on the WISC-IV fell squarely within the average range, although Student demonstrated a relative strength on the Perceptual Reasoning Index and a relative weakness on the Working Memory Index. Student's General Ability Index (GAI) score was in the average range. (S 31)

42. Student's achievement test scores were described as variable with reading and written language skills noted significant weaknesses. More specifically, Student demonstrated scores below expectations in the areas of phonemic awareness, auditory attention/working memory, and performance speed. In a comparison of scores on the WJ-III ACH in March 2007, November 2008, and July 2010, the independent evaluator concluded that Student had made steady progress in math while making only some progress in reading comprehension and reading fluency. The neuropsychologist described Student's reading deficits as "severe" (S 30 at 10) and she diagnosed a Reading Disorder using the DSM-IV-TR.⁷ She also opined that Student displayed significant weaknesses in the areas of processing speed, working memory, and phonological processing. (N.T. 205-07; S 30)

43. In her independent educational evaluation (IEE) report, the private neuropsychologist made a number of recommendations for Student's educational programming, including more intensive special education services in a full-time special education program. She provided specific suggestions for addressing Student's needs in reading and language arts:

- "a daily, intensive reading program using a systematic, multi-sensory, research validated reading approach" (S 31 at 11);⁸
- appropriate reading material sent home to practice daily
- daily sight word practice at home
- practice with writing assignments with accommodations for spelling weaknesses

She also recommended that consideration be given to Student's weaknesses in auditory working memory and processing speed. This evaluator did not observe Student in a classroom setting before her report was completed but she did so in September 2010. (N.T. 193-97, 226; S 31)

44. The District believed it could implement all of the recommendations of the private neuropsychologist in her IEE but disagreed with the suggestion that Student be placed in full-time special education. (N.T. 293-95)

45. Student was provided with an ESY program during the summer of 2010. (S 23, S 24)

2010-11 School Year

46. On August 12, 2010, the Parents contacted the District and asked for a meeting to discuss the independent evaluation and Student's educational program for the 2010-11 school year. Some of the members of Student's IEP team were not available on the date initially suggested by the Parents and, after coordinating schedules, the parties agreed to meet on August 27, 2010. (N.T. 267-68, 370; P 4)

⁷ American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (Rev. 4th Ed. 2000).

⁸ This hearing officer lacks sufficient information and expertise to make any finding with respect to the suggestion that Student may be "treatment resistant."

47. On August 15, 2010, the Parents applied for Student's admission to a private school. (N.T. 371-72; P 1)
48. By letter of August 23, 2010, the Parents expressed their ongoing concerns with Student's educational progress and provided notice of their intention to place Student in the private school for the 2010-11 school year if the District would fail to develop an appropriate IEP for Student within a reasonable time. (N.T. 372-73; P 2)
49. Student's IEP team met on August 27, 2010 and again on September 10, 2010 to revise Student's educational program for that school year, which was fifth grade. At the time of the August 2010 meeting, the school year had not yet begun as the first day of school was August 31, 2010. The District and Parents agreed that Student would start the 2010-11 school year in the District placement and baselines in reading would be obtained. They also discussed an assistive technology evaluation. (N.T. 267-70, 274, 317, 319, 373-75; P 4; S 25, S 33, S 34)
50. At the September 10, 2010 IEP meeting, the District provided the Parents with information on Student's then-current reading assessments by a reading specialist. On the DIBELS administered in September 2010, Student's oral reading fluency was 27 correct words per minute at the fifth grade level. Student read 49 words correct per minute at the first grade level and 40 words correct per minute at the second grade level. In nonsense word fluency, Student score was established at the second grade level. The District also had administered a Qualitative Reading Inventory (QRI) on August 31, 2010 which reflected that Student was instructional at a first grade reading level and frustrational at a second grade reading level, although other measures indicated that Student was instructional at a second grade reading level. Student demonstrated strong reading and listening comprehension skills. (N.T. 157-64, 166-67, 375-76; P 3; S 37)
51. The District also administered the Wilson Assessment of Decoding and Encoding (WADE) in September 2010. (N.T. 332-35; S 42)
52. Student's IEP was revised at the September 10, 2010 meeting. Two new reading goals were added which related to a "read aloud/think aloud" strategy and self-correction of reading material at Student's instructional level. Student would receive individualized instruction using the Wilson Reading Program for thirty minutes per day (which would continue to include vocabulary and fluency), and reinforcement of that instruction in a small group setting with a paraprofessional for another thirty minutes per day. To support Student in content areas, Student would be provided with books on tape/CD and adapted materials, and paraprofessional support would continue. (N.T. 296-98, 314, 324-25; S 34)
53. On September 15, 2010, the Parents notified the District that they had placed Student in the private school that morning. (N.T. 377-78; P 4)
54. The parties stipulated that the private school is appropriate for purposes of applying the three-pronged test for determining whether a parent is entitled to tuition reimbursement. (N.T. 15)

55. The District sent the Parents a NOREP dated September 16, 2010, and the Parents disapproved it on September 24, 2010. (N.T. 378; S 36)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005);⁹ *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See generally David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009). This hearing officer found each of the witnesses to be generally credible and the testimony as a whole was essentially consistent. The credibility of particular witnesses is discussed further in this decision as necessary.

The IDEA requires the states to provide a “free appropriate public education” (FAPE) to all students who qualify for special education services. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Under the IDEA and its implementing regulations, an IEP for a child with a disability must include present levels of educational performance, measurable annual goals, a statement of how the child’s progress toward those goals will be measured, and the specially designed instruction and supplementary aids and services which will be provided, as well as an explanation of the extent, if any, to which the child will not participate with non-disabled

⁹ The burden of production, “*i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding,” *Schaffer*, 546 U.S. at 56, relates to the order of presentation of the evidence.

children in the regular classroom. 20 U.S.C. § 1414(d); 34 C.F.R. §300.320(a). First and foremost, of course, the IEP must be responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. §300.324. Nevertheless, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

2008-09 School Year

When Student began the 2008-09 school year, Student's instructional reading level fell somewhere around the primer or 1.0 reading level (as set forth in the March 2008 IEP) (Finding of Fact (FF) 5) The IEP in place at the start of that school year contained goals addressing Student's needs in reading fluency, decoding/encoding, reading comprehension, and written expression. (FF 5, 6) Student received all language arts instruction in a small group setting in the learning support classroom and was provided support in content area classes. (FF 5)

With respect to Student's identified needs and IEP goals for this school year, this hearing officer concludes that Student did make meaningful educational progress in the areas of written expression and reading comprehension. With respect to reading comprehension, Student's IEP team determined that by December 2008, Student no longer exhibited a need for a goal in this area and, in fact, was demonstrating appropriate listening comprehension skills as evidenced by Student's ability to comprehend grade-level materials which were read aloud to Student. (FF 17) Even the Parents' expert opined that Student made progress in reading comprehension. (N.T. 232; *see also* S 31 at 8 (comparing Student's stable WJ-III ACH scores in passage comprehension in March 2007, November 2008, and July 2010)) In the area of written expression, Student had improved significantly toward the IEP goal, demonstrating an ability in June 2009 to write a one-paragraph essay on a single topic and increasing scores on the District writing rubric from 7 to 13 out of 20 based upon five elements as determined by a team of teachers. (FF 22) While the Parents' aptly point out that the March 2008 IEP lacked baselines for these particular goals, this information is readily available in the record and does not amount to a denial of FAPE. Procedural violations of the IDEA, standing alone, do not constitute a basis for finding a denial of FAPE absent an impediment to the provision of FAPE or to parental participation in the process, or a resulting educational deprivation. *See Winkelman v. Parma City School District*, 550 U.S. 516, 525-26 (2007) (quoting 20 U.S.C. 1415(f)(3)(E)).

Student did not, however, demonstrate similar meaningful progress in all areas of reading need for the entire school year. Tellingly, Student's learning support teacher described Student's progress toward reading goals in the late fall of 2008 as "minimal." (FF 9) Student did improve nonsense word fluency, reaching an established level in February 2009 at which time monitoring of that skill was discontinued as no longer necessary. (FF 19) By contrast, in oral reading fluency probes, Student's improvement between September 2008 and June 2009 (FF 15, 19, 20) is tempered by the fact that Student's DIBELS scores were relatively stagnant during the spring semester of the 2008-09 school year with only two scores within the targeted range. (S 2) While some variability in scores on probes might be expected for any child, a trend of no improvement over time indicates a lack of progress toward a goal. Even more concerning is that, in the areas of decoding and encoding, the extent of Student's progress over that school year is impossible to

discern. There is no actual progress monitoring for reading/decoding in the fall of 2008 which corresponds to the March 2008 IEP goal, and the information provided for the December 2008 RR serves only as a baseline for the reading decoding/encoding goal. (FF 10, 15, 21) While there is progress report monitoring data on Student's decoding and encoding goals in February 2009, that information mirrors Student's baseline and reveals little or no improvement. (FF 15, 21) Moreover, Student's progress on the decoding/encoding goal for the remainder of that school year is expressed in percentages of accuracy on spelling and dictation measures, wholly excluding any information on Student's decoding of first and second grade words. (FF 21) Student's severe need to develop these crucial reading skills was well documented and a clear focus of Student's educational programming. (FF 3, 5, 6, 7, 9, 12, 14, 15, 19, 20, 21) The lack of sufficient information from which to gauge Student's skills in reading decoding and encoding over the course of the 2008-09 school year, coupled with the absence of improvement in oral reading fluency in the spring of 2009, leads to the inescapable conclusion that Student did not make meaningful educational progress in all areas of reading over the course of the 2008-09 school year.

It is well settled that compensatory education is an appropriate remedy where a school district knows, or should know, that a child's educational program is not appropriate or that he or she is receiving only trivial educational benefit, and the district fails to remedy the problem. *M.C. v. Central Regional School District*, 81 F.3d 389 (3d Cir. 1996). Such an award compensates the child for the period of time of deprivation of special education services, excluding the time reasonably required for a school district to correct the deficiency. *Id.* In addition to this "hour for hour" approach, some courts have endorsed an approach that awards the "amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE." *B.C. v. Penn Manor School District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006) (awarding compensatory education in a case involving a gifted student); *see also Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010) (quoting *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (explaining that compensatory education "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.")). Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

In this case, there was little if any evidence which would permit a determination of what position Student would have been in had Student been provided with appropriate reading instruction in all areas throughout the 2008-09 school year. I therefore conclude that the *M.C.* standard is the appropriate method of determining the amount of compensation education owed to Student in this case. During this school year, Student was spending approximately 1.5 hours per day in the learning support classroom for language arts instruction. (FF 5) There is no evidence that the amount of time that Student spent in language arts instruction in the 2008-09 school year was insufficient, and based upon Student's scheduled classes, there is no basis on which to conclude this amount of time is not an appropriate starting point for calculating compensatory education. Having determined that Student did make meaningful educational

progress in the area of writing and reading comprehension,¹⁰ but not in the critical areas of reading fluency and decoding/encoding, this hearing officer makes the equitable calculation that Student should be awarded one hour per day of compensatory education for the 2008-09 school year, excluding a sixty day period of reasonable rectification at the beginning of the school year,¹¹ to remedy the denial of FAPE for this school year.

The Parents also sought compensatory education for the summer of 2009. There was very little evidence produced with respect to Student's programming and progress for the ESY program in 2009, other than that Student worked on areas of educational need including oral reading fluency. (FF 18, 25) After review of all of the evidence, this hearing officer concludes that the Parents failed to meet their burden of establishing that Student was denied FAPE by reason of the 2009 ESY program.

2009-10 School Year

Student began this school year using second grade reading materials, and was receiving reading instruction using the Wilson Reading Program which addressed decoding and encoding. (FF 26, 27) This hearing officer takes notice that the Wilson Reading Program is a highly structured, systematic, multi-sensory, sequential, research-based reading program. The Wilson program was delivered in a small group setting. (FF 26) However, by the December 18, 2009 IEP meeting, Student's Wilson Reading teacher recognized that Student required individualized reading instruction and that she needed to go back and repeat all of the Wilson program which Student had had. (FF 31) Thus, it is evident that all of the Wilson reading instruction between September and December 2009 was not appropriate to meet Student's decoding and encoding needs. The District is entitled to a reasonable period to discover and rectify the situation, and took appropriate steps beginning in December 2009 to provide Student with individualized instruction in the Wilson Reading Program. Given that this was a new reading program for Student, and also considering the intensity of Student's reading disability, this hearing officer concludes that the District's decision as of the December 18, 2009 IEP to provide individualized reading instruction was a reasonable and timely response.

Student began to make progress in the Wilson Reading Program after individual instruction began in December 2009. (FF 31, 33) Although Student was still using Book 1 materials at the end of this school year, Student was working on progressively more difficult skills in this sequential program.¹² (FF 33) There was no evidence that Student should have reached a higher Wilson level by the end of the 2009-10 school year and, given the severity of Student's reading disability and the very recent change to individualized Wilson instruction, this hearing officer cannot conclude that Student's progress in this particular area was less than meaningful and appropriate.

¹⁰ There was also no evidence establishing that Student did not make meaningful educational progress in the content areas with the provided support.

¹¹ This period of reasonable rectification also accounts for the time period at the beginning of the school year when Student was in school but for which Parents made no claim.

¹² This hearing officer has some familiarity with the sequential approach of the Wilson Reading Program, and the District's use of Wilson with Student is not inconsistent with that familiarity.

However, Student was not having as much success in all aspects of reading that school year. Student's progress on oral reading fluency reflected little improvement, with highly variable DIBELS results at the second grade level and nearly identical scores in October 2009, February 2010, and June 2010 indicating a lack of mastery toward the IEP goal, as discussed above. (FF 33) Similarly, Student's reading comprehension progress after the December 2009 IEP (when that goal was returned to Student's program) was minimal at best. (FF 34) There was also no action taken on the suggestion of the elementary special education supervisor to convene a meeting and discuss additional reading interventions for Student. (FF 37) Again, Student's known needs for improving oral reading fluency and reading comprehension was well documented. (FF 30, 31, 32, 33, 34) Overall, the evidence is preponderant that Student failed to make meaningful educational progress in these two critical areas of reading throughout the entire 2009-10 school year. Further, given the District's continued knowledge of Student's significant learning disability in reading, this hearing officer concludes that no further period of reasonable rectification is warranted after December 18, 2009.

By contrast, Student did make meaningful educational progress during the 2009-10 school year in written expression, where Student attained a proficient level on the District's writing rubric by the end of the 2009-10 school year. (FF 35) While Student's December 2009 IEP did not specify a particular level as a written expression goal, Student's score of 14 out of 20 at the end of the 2009-10 school year reflects a steady improvement. (FF 30, 35) Even the Parents' private neuropsychologist opined that Student's written expression skills were adequate and "favorable" (S 31 at 8), with the exception of spelling which she attributed to Student's difficulties with word reading and phonetic decoding. (S 31) Overall, this hearing officer concludes that Student made meaningful educational progress in written expression over the 2009-10 school year.

2010-11 School Year

Student attended the first few days of the 2010-11 school year in the District, during which time the parties had agreed that baseline information on Student's reading levels would be obtained. (FF 49) Although the Parents are technically seeking compensatory education for this time period, it is evident that the minimal amount of time Student spent in the District that school year was insufficient to permit any determination of whether the educational programming provided to Student while the reading assessments were ongoing was appropriate or inappropriate.

Nonetheless, the Parents' main focus for this school year is tuition reimbursement for the private school placement. Under the IDEA, parents who believe that a public school is not providing FAPE may unilaterally remove their child from that school and place him or her in a private school, and also seek tuition reimbursement for the cost of the alternate placement. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c); *Mary Courtney T.*, 575 F.3d at 242. Tuition reimbursement is an available remedy for parents to receive the costs associated with a child's placement in a private school where it is determined that the program offered by the public school did not provide FAPE, and the private placement is proper. *Florence County School District v. Carter*, 510 U.S. 10 (1993); *School Committee of Burlington v. Department of*

Education, 471 U.S. 359 (1985). Nevertheless, “the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993). Consideration of equitable principles is also relevant in deciding whether reimbursement for tuition is warranted. *Carter, supra*; see also. See *Forest Grove School District v. T.A.*, ___ U.S. ___, 129 S.Ct. 2484 (2009) (explaining that tuition reimbursement award may be reduced where equities warrant, such as where parents failed to provide notice). In considering the three prongs of the tuition reimbursement test, the concept of least restrictive environment (LRE) is not controlling in evaluating parents’ unilateral placements. *Ridgewood, supra*. A private placement also need not satisfy all of the procedural and substantive requirements of the IDEA. *Carter, supra*. The standard is whether the parental placement was reasonably calculated to provide the child with educational benefit. *Id.*

The first issue is whether the District’s proposed program for the 2010-11 school year, based upon the September 10, 2010 IEP, was reasonably calculated to provide Student with meaningful educational benefit. With respect to reading, the District proposed providing Student with thirty minutes of individual instruction each day using the Wilson Reading Program which would be supplemented by thirty minutes of daily reinforcement of that instruction by a paraprofessional. (FF 52) This proposal is a reasonable approach to increasing the level of intensity of Student’s reading program, which would further address Student’s fluency needs. (FF 52) The two additional goals in the IEP also provided specific programming in reading comprehension and fluency. (FF 52) The daily individualized Wilson instruction is also directly aligned with the Parents’ expert’s recommendation that Student receive a daily, intensive, systematic, multi-sensory reading program. (FF 43) The District’s reading specialist had recent information from the WADE to assist the teacher using the Wilson program to identify and target Student’s needs as Student progressed through that sequential program. (FF 50) Nearly all of the recommendations of the Parents’ expert for supporting Student in the classroom (content-area books on tape or CD; prompts to remain on task and maintain attention; information presented in various formats (visual and verbal); extended time for tests) are part of the specially designed instruction in the IEP as revised in September 2010. (S 31, S 34) Other items of specially designed instruction would meet Student’s needs for practice and repetition of new concepts, permission to use verbal responses rather than written, opportunities for breaks, adapted materials for support in content area classes, paraprofessional support in content area classes, and decreased homework expectations. (FF 52; S 34)

Moreover, an assistive technology evaluation was discussed at the September 2010 meeting which would permit consideration of the recommendation related to Student’s poor spelling and writing assignments. (FF 49) The District appeared to be prepared to implement each of the recommendations of the Parents’ expert,¹³ and provided credible testimony at the hearing that it was able to do so, with the exception of the rather extreme recommendation that Student be placed in a full-time special education program. (FF 44) This hearing officer cannot conclude that such a placement was warranted for Student, and further notes that such a decision by the IEP team would require careful consideration of the IDEA LRE mandate, a step not

¹³ This hearing officer cannot conclude that a short delay in acquiring all of the content area materials in audio format (P 4 at 20) at the very start of the school year renders the proposed IEP inappropriate.

discussed in the IEE. *See* 20 U.S.C. § 1412(a); *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572, 578 (3d Cir. 2000); *Oberti v. Board of Education of Clementon School District*, 995 F.2d 1204, 1205 (3d Cir. 1993). Furthermore, the Parents' expert appeared to waver somewhat from her conclusion that Student required a full time special education program in her testimony at the hearing. (N.T. 194-98) For all of these reasons, while this hearing officer found the Parents' expert witness to be extremely knowledgeable and credible, little weight was accorded this particular recommendation.

It also merits mention that the District's ability to convene the IEP team to fully revise Student's IEP within a relatively narrow time frame was limited. The Parents contacted the District on August 12, 2010 and requested an IEP meeting before school started. (FF 46) While the Parents did so immediately upon receipt of the IEE, and understandably wanted to have a completed IEP before the first day of school, it is also apparent that the District responded quickly and made every effort to do so while team members also attended to their various responsibilities with starting a new school year after a summer off. (FF 46; P 4) Further, although Student's present educational levels were not updated in the existing IEP as revised on September 10, 2010, there is no question that the IEP team did have a good deal of information in the form of several assessments of Student's reading skills obtained by the reading specialist during the first few days of that school year, and the results were shared with the entire IEP team including the Parents. (FF 50, 51) The Parents' sincere desire to have Student's programming finalized at the very beginning of the school year is certainly not unreasonable or unjustified, particularly given their concerns with Student's significant and continued difficulties with reading, but this hearing officer cannot conclude that the District denied Student FAPE because its September 10, 2010 IEP did not include all of that newly obtained information in the body of the document reviewed at that meeting.

After careful review, this hearing officer concludes that the September 10, 2010 IEP was directly responsive to the IEE, appropriately addressed all of Student's identified needs, and was reasonably calculated to provide Student with meaningful educational benefit. Accordingly, having therefore determined that the District did not deny Student FAPE for the 2010-11 school year, there is no need to address the remaining prongs of the test for tuition reimbursement.

Section 504 Claims

The obligation to provide a "free appropriate public education" is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005). Because all of the Parents' claims have been addressed pursuant to the IDEA, there need be no further discussion of their claims under Section 504.

CONCLUSION

For all of the foregoing reasons, this hearing officer concludes that the District did deny FAPE to Student with respect to reading for the 2008-09 and 2009-10 school years, and that Student is entitled to compensatory education. I also conclude that the District did not deny

FAPE to Student for the 2010-11 school year and there is no basis to award tuition reimbursement.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not provide FAPE to Student in a portion of its reading program for the 2008-09 school year, and Student is accordingly entitled to one hour of compensatory education for each day that school was in session that school year, excluding the first sixty school days as a period of reasonable rectification, and continuing through the last day of the 2008-09 school year.
2. The District did not provide FAPE to Student in a portion of its reading program for the 2009-10 school year, and Student is accordingly entitled to one hour of compensatory education for each day that school was in session that school year, beginning on December 18, 2009, and continuing through the last day of the 2009-10 school year.
3. The hours of compensatory education are subject to the following conditions and limitations. Student's Parents may decide how the hours of compensatory education are spent. The compensatory education may take the form of any appropriate developmental, remedial or enriching educational service, product or device that furthers the goals of Student's current or future IEPs. The compensatory education shall be in addition to, and shall not be used to supplant, educational and related services that should appropriately be provided by the District through Student's IEP to assure meaningful educational progress. There are financial limits on the parents' discretion in selecting the compensatory education. The costs to the District of providing the awarded hours of compensatory education must not exceed the full cost of the services that were denied. Full costs are the hourly salaries and fringe benefits that would have been paid to the District professionals who provided services to the student during the period of the denial of FAPE.
4. The District did not fail to offer FAPE to Student for the 2010-11 school year and no remedy is awarded.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

March 15, 2011
01634-1011AS